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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

PHILIP G. DOWNS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Philip G. Downs petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App.A, infra) is reported at _____ F.2d _____ (5th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals (App.A, Infra) was entered on April 17, 1980. The jurisdiction of this Court is invoked under U.S.C.§1254(1).

QUESTION PRESENTED

1. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL OR NEW TRIAL WHEN THE PROSECUTOR MADE AN IMPROPER REMARK CONCERNING APPELLANT'S CHARACTER?

2. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL OR NEW TRIAL WHEN THE PROSECUTOR MADE AN IMPROPER REMARK CONCERNING APPELLANT'S "CHOOSING NOT TO PRESENT A DEFENSE" AND THEREBY COMMENTING ON THE APPELLANT'S FAILURE TO TESTIFY AS WELL AS SHIFTING THE BURDEN OF PROOF ONTO THE APPELLANT?

STATUTE INVOLVED

18 U.S.C.§3481
Federal Rule of Evidence, Rule 404(a)

STATEMENT

The appellant was convicted of filing

false returns and income tax evasion.

The government alleged that appellant was vice president in charge of trucking for a large carpeting manufacturer, E. T. Barwick Industries and that appellant went to Fairmont Corporation and offered to "backhaul" merchandise for them. E. T. Barwick Industries was a private carrier and could not engage in the business of transportation for hire. In light of the illegal nature of the transaction, all payments were to be made to the appellant.

The government maintained that the appellant was acting on his own and did not remit the funds to his employer or use them for his employer's business benefit. The appellant claimed that he was acting only as a conduit for his employer, and, thus, that the funds deposited in his account were not income to him. The appellant did not testify or present a defense.

At the beginning of his closing argument, the prosecutor made the following statement:

> "Ladies and gentlemen, you probably noticed right from the very beginning of this case the flavor of the case as it was presented, right at the very start. You will recall the opening statement by Mr. Martin, counsel for the defendant, when he said, oh, yes, the defendant was doing wrong here, that will be shown; but he said at the same time that doesn't mean he was doing wrong here, of course, denying any kind of tax liability or tax implications, but at the same time admitting that he was a wrongdoer." (R. Vol. 5, 3)

At that point defense counsel moved for a mistrial. (R. Vol. 5,4) The mistrial was denied but the jury was instructed to ignore the government's comment. (R. Vol. 5, 5)

During his summation the prosecutor, after discussing the evidence on each element of the offense, stated:

> "The important thing, I submit, that is very important in this case, you will recall that during the trial of this case Mr. Martin chose not to present a defense." (R. Vol. 5, 11)

Again the defense counsel moved for a mistrial. (R. Vol. 5,11) A ruling was reserved and when the jury returned they were instructed by the Court to disregard the statement and further that the defendant had no duty to present any evidence and that the defendant's failure to offer evidence had no effect on the burden of proof, which remained with the government. (R. Vol. 5, 15). The motion for mistrial was later denied. (R. Vol. 1, 175-179)

The Court charged the jury (R. Vol. 5, 42-62) and after an hour the jury returned with a question:

"Does the government have to prove that the defendant spent the money on himself to show that the money received from Fairmont needs to be considered income, or does the defendant having admitted he received the money from Fairmont have to prove that he was just a conduit for Barwick, Inc.?" (R. Vol. 5, 65)

The Judge then further instructed the jury that the government did not have to prove where the money was spent but only that the appellant had the benefit of it and that the appellant did not have to prove anything. (R. Vol. 5, 65, 66).

The jury returned a verdict of guilty against the appellant on all three counts. (R. Vol. 5, 67). The appellant was sentenced to one year in prison on County One and to two-three year suspended sentences, to be run concurrently, on Counts Two and Three. He was also fined $10,000 on Count Three.

REASONS FOR GRANTING THE WRIT

A defendant's right to not give evidence at his trial and to not have that fact used against him gives rise to a problem that repeatedly presents itself in all of the courts of this land where jury trials are held, locally, statewise and in the federal courts. The state courts and the Federal Circuit Courts of Appeals do not follow a uniform means of dealing with this problem. Because it does involve fundamental constitutional rights and because it is such a continuing and frustrating practice, a definite and uniform guideline should be laid down. It simply is not necessary for prosecutors to build their cases upon defendants' failure to testify or otherwise put in a defense. They should be barred from commenting upon the matter entirely and end this problem once and for all. Such a policy would not harm criminal cases of substance. Furthermore, distasteful comments by a prosecutor about a defendant's character, even if invited, are unnecessary.

1. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL OR NEW TRIAL WHEN THE PROSECUTOR MADE AN IMPROPER REMARK CONCERNING APPELLANT'S CHARACTER?

The prosecutor, made an improper remark concerning the appellant's character. He stated that because the appellant had admitted his involvement in illegal backhauling and bribery that the jury could properly conclude that the appellant was a "wrongdoer". (R. Vol. 5, 3) The appellant had not placed his character in issue by testifying to his own character or by calling character witnesses to testify.

In a trial where the appellant has not put his character in issue, a statement by the prosecutor which maligns the appellant's character is so unduly prejudicial that it necessarily denies the appellant a fair trial and requires granting a reversal.

Rule 404(a) of the Federal Rules of Evidence prohibits the use of character evidence to prove that the defendant is a bad man who probably committed the crime in question. Rule 404(a) states that:

> "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...."

This rule that evidence of a defendant's general bad character is not probative of his guilt or innocence of a particular criminal charge has long been the federal rule established by sound judicial reasoning prior to

the establishment of the Federal Rules of Evidence and, as noted in the Advisory Committee Notes to Rule 404(a), "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions".

The Supreme Court has ruled that evidence as to the defendant's general bad character should be precluded from the prosecutor's case-in-chief because such evidence, "weighs too much with the jury and causes them to prejudice one with a bad general record, thus denying him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469 (1948). By precluding evidence which might portray the defendant as an evil person with a propensity to commit criminal acts, the courts have insured against confusion of issues, unfair surprise and undue prejudice.

Decisions rendered by the Fifth Circuit are in complete accord with the general rule. United States v. Bowdach, 501 F.2d 220 (5th Cir.1974). In Hurst v. United States, 337 F.2d 678 (5th Cir.1964), the Court held that it was reversable error for the prosecutor to introduce evidence of the defendant's alleged evil character in order to prove that the defendant was guilty of the crime charged. The Court noted that

> "There is probably no better known rule of common law criminal practice than that courts are careful to disallow resort by the prosecution to any type of evidence of defendant's evil character to establish probability of guilt." 337 F.2d at 680.

Fifth Circuit authority most closely on point is Benham v. United States, 215 F.2d 472 (5th Cir.1954), a case surprisingly similar to the case at bar. In Benham, the defendant was accused of income tax evasion. The prosecutor improperly commented on the defendant's failure to testify but more importantly emphasized evidence in the case that the defendant had charged usurious interest, from which he urged the jury to conclude that the defendant "was not a good man" and that the "type of man you are dealing with" was relevant as to "whether or not he has intent to evade." at 474, n.1. Similarly, here the prosecutor urged the jury to conclude there was an intent to evade because the defendant was a "wrongdoer." (R. Vol. 5, 3)

In Benham, supra, the Fifth Circuit found the comments of the prosecutor to be so grossly prejudicial as to amount to plain error. Moreover, the Court noted that an objection and a limiting instruction, as in this case, was insufficient to correct the harm already done. As has been noted by the Fifth Circuit, "one 'cannot unring a bell', 'after the thrust of the saber it is difficult to forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct a jury not to smell it'." Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962). See also, Hall v. United States, 419 F.2d 582 (5th Cir. 1969), where the prosecutor characterized the accused as a "hoodlum". The Court said that this type of short-hand characterization of any accused is especially likely to stick in the minds of the jury and influence its deliberations and thus is incurable by instructions after the fact. See United States v. Williams, 523 F.2d 1203 (5th Cir. 1975).

Appellant is not contending that it was improper for the government to comment on the evidence elicited by the appellant on corss-examination that the money shown to have been received by the appellant was not income to him, but was used to pay bribes. Similarly, the government was entitled to present evidence of its theory that the defendant had in fact embezzled the money in question from his employer. Admission of evidence of such alleged "other crimes" and comment thereon is proper because it is relevant to an important issue in the case, namely whether or not the funds involved were income to the appellant. However, such is entirely different from comment on such evidence as proof that the appellant is likely to be guilty because he has some propensity to commit crime.

In urging the jury to conclude from the appellant's admissions of illegal backhauling and bribery that the appellant was a "wrongdoer", the prosecutor was not fairly commenting on evidence of "other crimes" as was relevant to an issue in the case, that is whether or not income had been derived from the receipt of certain funds, but was making the unfair and prejudicial argument that the jury ought to conclude that the appellant is likely to be guilty of the crime charged because he is a "wrongdoer", in an entirely different context. Such an argument urging the jury to find guilt because of the appellant's liklihood to commit crimes, (i.e., that he is "an habitual criminal"), is clearly improper when the appellant has in no way asserted "good character" as a defense. Moreover, it can only have been done for the

precise purpose of prejudicing and enflaming the jury against the accused. Such remarks could have no other, legitimate, purpose.

Accordingly, the remark by the prosecutor was in direct violation of the long established rule that a defendant's bad character is of no consequence in determining criminal conduct in a particular instance. Once said and urged upon the jury, the harm from the comment could not be corrected by the Court's admonitions. Therefore, a reversal of the judgment is required.

2. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL OR NEW TRIAL WHEN THE PROSECUTOR MADE AN IMPROPER REMARK CONCERNING APPELLANT'S "CHOOSING NOT TO PRESENT A DEFENSE" AND THEREBY COMMENTING ON THE APPELLANT'S FAILURE TO TESTIFY AS WELL AS SHIFTING THE BURDEN OF PROOF ONTO THE APPELLANT?

The prosecutor made a further improper remark in his closing argument compounding the earlier prejudicial remark, when he stated that "the important thing, I submit, that is very important in this case, you will recall that during the trial of this case Mr. Martin has chosen not to present a defense." (R. Vol. 5, 11) This comment constituted an unconstitutional reference to appellant's failure to testify as well as an improper attempt to shift the bruden of proof onto the appellant in the eyes of the jury. The appellant's counsel objected to the remark. (R. Vol. 5, 11) The Court then instructed the jury that the remark was improper, that the appellant was not required to put up any evidence, and that the prosecutor's remark should be

disregarded. (R. Vol. 5, 5)

After approximately an hour of deliberating, the jury returned with a question as to whether the appellant had spent funds in his possession before such funds could be found to be income to him or whether the appellant had to prove that he was merely a conduit for the funds. (R. Vol. 5, 65) The judge then further instructed the jury that the government did not have to prove where the money was spent but only that the appellant had the benefit of it and that the appellant did not have to prove anything. (R. Vol. 5, 65-66)

It is well settled that under both the Fifth Amendment to the United States Constitution and 18 U.S.C.§3481, it is not permissible for the prosecution to comment on a defendant's failure to testify. The Supreme Court has held that comments by the prosecutor on defendant's silence are constitutional errors. Griffin v. California, 380 U.S. 609 (1965); Chapman v. California, 386 U.S. 18 (1967) As noted on 711 in Chapman, a new trial is mandatory unless the comment was harmless "beyond a reasonable doubt".

The reference to a defendant's silence need not be direct. Oblique comments on a defendant's failure to testify, if sufficiently suggestive, are as unlawful as direct comments. United States v. Driscoll, 454 F.2d 792 (5th Cir.1972); Benham v. United States, 215 F.2d 472 (5th Cir. 1954); United States v. Brown, 546 F.2d 166 (5th Cir. 1977)

The test adopted by the Fifth Circuit to determine if there has been improper

comment on the failure of the defendant to testify is whether or not the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. United States v. Edwards, 576 F.2d 1152 (5th Cir. 1978); United States v. Rochan, 563 F.2d 1246 (5th Cir. 1977); United States v. Dearden, 546 F.2d 622 (5th Cir. 1977); United States v. White, 444 F.2d 1274 (5th Cir. 1971); cert. den. 404 U.S. 949 (1971) The prosecutor's statement in closing argument that "Mr. Martin has chosen not to present a defense" is such a statement (R. Vol. 5, 11). It represents an attempt by the government to call to the attention of the jury the failure of the appellant to produce evidence, thus causing them to draw an inference of guilt from the failure. It is of a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. Fowler v. United States, 310 F.2d 66 (5th Cir.1962). This is especially true here where the evidence showed that the distribution of the funds received from Fairmont Corporation was solely controlled by Mr. Downs and Mr. Downs would be the only one who could testify as to the specifics of the distribution. That the jury was led to believe this by the prosecutor's comment is buttressed by the question later asked by the jury as to whether the defendant had to prove he was a conduit. (R. Vol. 5, 65)

In addition, the comment was an improper effort to shift the burden of proof in the minds of the jury. United States v. Bashaw, 509 F.2d 1204 (9th Cir.1975). The defendant in a criminal case is entitled to the

presumption of innocence and has no burden of presenting evidence. Woods v. Estelle, 547 F.2d 269 (5th Cir.1977), cert. den. 434 U.S. 870 (1977). The Supreme Court has recognized that this presumption is a basic component of a fair trial and has stated that "to implement the presumption, courts must be alert to factors that may undermine the fairness of the fact finding process," and must "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501 (1976).

Statements by prosecutors, such as the statement made in this case, which attempt to overthrow this presumption of innocence arise to errors of constitutional dimension in that they undermine the fairness of the fact finding process.

In United States v. Smith, 500 F.2d 293 (6th Cir.1974), a prosecutor had implied by his comment on the defendant's silence that the defendant had the burden of explaining certain evidence against him. In that case the Court found the prosecutor's argument to be an attempt to abrogate the presumption of innocence, which invited the jury to draw inferences of guilt from the failure to offer proof of innocence. The Court held that the comment violated the spirit of Griffin v. California, supra, and reversed the appellants' conviction. The comment of the prosecutor in this case is, like that of the prosecutor in Smith, an attempt to undermine the defendant's presumption of innocence. It is, therefore, like the comment made in Smith, a violation of Griffin and Chapman, supra.

The comments of the prosecutor constitute constitutional error, and are grounds for reversal, unless deemed to be harmless beyond a reasonable doubt. While Courts have held that prosecutorial comment may be harmless error and may be corrected by instruction, the Supreme Court has made it clear that before such constitutional errors can be deemed harmless the Court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Chapman v. California, supra. In other words, there must be no reasonable possibility that the evidence complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85 (1963). Chapman v. California, supra. This is not the case here.

Unlike most cases where the effect of a statement on the jury is the subject of speculation only, in this case there is positive evidence that the prosecutor's comment served to confuse the jury as to placement of the burden of proof. The fact that the jury returned from its deliberations, despite the previous instructions of the judge regarding the burden of proof, with the question whether the government had to prove that the defendant had spent the money or whether the defendant had to prove that he was merely a conduit for the money, (R. Vol. 5, 65) indicates that the judge's curative instructions did not eradicate the harm caused by the prosecutor's comment on appellant's failure to present a defense. The jury was obviously confused and mislead by the prosecutor's argument, as was demonstrated by their question, and compounded by the Court's ineffectual admonition.

Under these circumstances it cannot be

said with certainty that there is no reasonable possibility that the comment by the prosecutor might have contributed to the conviction. The harm from the remark is not mere speculation but is clear of record. Thus, the error committed was not harmless. This same result was reached by the Court in United States v. Smith, supra, where curative instructions as to the burden of proof were also given but were found not to render the error harmless.

Another primary consideration of courts for purposes of deciding whether an error was harmless or prejudicial (in determining if an improper comment had any reasonable possibility of affecting the verdict) has been the strength of the evidence of the defendant's guilt. United States v. Edwards, supra; United States v. Rhoden, 453 F.2d 598 (5th Cir. 1972).

In United States v. Edwards, supra, the Court held that the weakness of the evidence made it impossible to view the prosecutor's comments on Edwards' silence as harmless error. In reversing the defendant's conviction the Court said that "the comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete. We suggest that it be abandoned as a prosecutorial technique". at 1155. As the Court in Edwards thwarted the prosecutor's attempt to "shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence," at 1155, this Court should thwart the prosecutor's use of his remark in swaying the jury in this

case. As in Edwards, this is not a case involving overwhelming evidence of guilt or such strength on the part of the prosecutor's position that the comment of the prosecutor can be said to be harmless beyond a reasonable doubt. Though the government clearly proved the appellant's receipt of funds, the evidence of any beneficial result from such funds was non-existent. Indeed, the evidence, including both direct and circumstantial evidence, was uncontradicted that the so-called "Fairmont funds" were received by the defendant. However, it was circumstantial and contradictory, even among the government's own witnesses, with regard to the issue of benefit to the appellant. That such receipt was in the scope of, and in furtherance of, his employer's corporate purposes, is manifestly a reasonable hypothesis. Thus, we do not have a case where the evidence of guilt was overwhelming and it cannot be concluded that the prejudicial remark was harmless beyond a reasonable doubt. Here it would be impossible to conclude that the prejudice from the improper remarks was harmless beyond a reasonable doubt. Chapman v. California, supra.

In United States v. Bursten, 453 F.2d 605, 608, (5th Cir.1971), the government in its rebuttal argument charged the defendant with "panic" and "inability to put on a defense". These comments were made in response to the defendant's closing argument and in response to the defendant's opening statement in which he asserted that there was evidence he intended to put on. The Fifth Circuit upheld the prosecutor's remarks as being "when viewed in proper perspective ...in the nature of a rebuttal to these

arguments', at 610. Accordingly, the Court in Bursten was relying on what has sometimes been called the "doctrine of fair response" which the Fifth Circuit noted arose from comments of Judge Learned Hand in United States v. Feinberg, 140 F.2d 592 (2nd Cir.1944). In this case, however, the prosecutor's remark can be seen in no way as a "fair response" to anything that the appellant asserted. Indeed, the comments involved here were purely gratuitous and not made in the government's rebuttal argument as in Bursten, but in the government's opening argument. Accordingly, the Bursten case is clearly distinguishable.

In United States v. Johnson, 337 F.2d 180 (4th Cir.1964), a comment that the defendant had presented "no defense in this case" was considered by the Fourth Circuit not to require reversal under the peculiar "circumstances" of that case. The key "circumstance" as relied on by the decision was that the defendant was "not the only person who could have refuted the government's witnesses", at 203. The Court reasoned that in that particular situation, the prejudice from the remark was not manifest.

This distinction is made clear in Desmond v. United States, 345 F.2d 225 (1st Cir.1965), cited with approval in Holden v. United States, 393 F.2d 276 (1st Cir.1968). In Desmond, a remark that the key government witness's statement stood "unimpeached and uncontradicted" was held to be reversible error because no one but the defendant could have contradicted the witness. Similarly in this case, the appellant, being the only one who would have direct knowledge of the distribution of the funds received from Fairmont Corporation,

would have been the only one who could have testified to the specifics of its distribution. Accordingly, the Johnson, supra, case is distinguishable and this case falls more clearly under the authority of Desmond.

In the case at bar the intent or frame of mind of the defendant were critically involved in those matters which the jury was bound to consider in determining his guilt or lack of guilt; therefore, the defendant himself was the only person who could have effectively contradicted the government's evidence. As the Court stated in Desmond v. United States, 345 F.2d 225, 227 (1st Cir. 1965), "unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself: and "we can think of no effect other than to invite the jury's attention to the fact the defendants had not taken the stand."

In Government's brief (p. 24) they state that the Court in United States v. Edwards, 576 F.2d 1152 (5th Cir. 1978) stated that a comment upon the silence of the accused will only rarely occasion a reversal. Actually, however, the Court in Edwards said, "the circumstances under which it will not occasion a reversal are few and discrete,: (at 1155). This case is much like the Edwards case in that in both there was "less than-overwhelming evidence".

The Government argues that any error in the prosecutor's argument was harmless. This is simply not the case. There is positive

evidence that the jury was confused and that the harm was not cured by the Court's instructions. The jury returned from its deliberations with questions (R. Vol. 5, 65) that show they were unsure and that the harm was not eradicated. We cannot say in this case, as in United States v. Smith, 500 F.2d 293, (5th Cir. 1974) that the comments did not have a substantial influence on the jury. In Smith, the Court stated "like a comment calling the jury's attention to a defendant's bad character, the prosecutor's comments here intended to 'overthrow the presumption of innocence', (at 297).

In the case of Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969) the defendant was convicted in U.S. District Court of Puerto Rico on a narcotics charge. In that case it was not clear that someone other than himself might have been called as a witness. However, the prosecution hammered the point home relentlessly stating that its evidence was uncontradicted. In reversing and remanding the case for a new trial the Appellate Court said (at 531) "a different case might be presented if it were clear from the record that there was someone other than himself whom the defendant might call as a witness"..."indeed, the very persistence of the government in making these remarks is proof that it attached much importance to them"...

In the United States v. Flannery, 451 F.2d 880 (1st Cir. 1971) the defendant had appealed from the U. S. District Court for the District of New Hampshire from a jury conviction on a charge of conspiracy to circulate forged postal orders along with

four others where it appeared that the defendant was the only one who could have refuted the state's evidence at his trial but did not take the stand and where the prosecutor referred to the state's evidence as being "uncontradicted." The Court of Appeals (at 882) found that the term "uncontradicted" was:

> "accurate but a prejudicial violation of the rule under any standard. Defendant did not object, perhaps fearful of making the matter worse, and the court's failure to interrupt may have been for the same reason. The government had no right, however, to place the defendant in this dilemma".

The court went on to say (at 881-882):

> "the difficulty in such reference when only the defendant could have contradicted, clearly calls to the jury's mind the fact that he failed to testify. In spite of frequent repetition of this, what would seem to us obvious, conclusion, government attorneys, either uninstructed or unmindful of their instructions have persisted in ignoring our ruling"..."its persistence in so doing, despite admonitions by trial judges as well as ourselves, produces a sense of futility. Hereafter, as to cases tried after the date of this opinion, when it is apparent on the record that there was no one other than himself whom the defendant could have called to contradict the testimony, we shall not endeavor to waive prejudice, but shall rule it prejudicial as a matter of law, with a

> single exception: if the court interrupts the argument, instructs the jury fully on the defendant's constitutional right not to testify and the jury's obligation not to draw unfavorable inferences and, in addition, states to the jury that the U.S. attorney was guilty of misconduct, we may find no prejudice; otherwise we will reverse."

In State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976) the defendant was convicted of murder. His wife testified on his behalf but not extensively. The prosecutor emphasized the lack of evidence on the defendant's side of the case in his argument to the jury. The Appellate Court said (at 636):

> "The comment 'no one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses' was certainly calculated to point out to the jury that the defendant had not taken the stand and testified and was, we believe, fundamental error."

The case was reversed and remanded for a new trial.

The Supreme Court of Iowa had a very interesting view of the prosecutor's comments to the effect that the defendant had failed to contradict or controvert the state's case and attacked such comment finding error for two distinct but very fundamental reasons. In the case of Iowa v. Nelson, reported at 234 N.W.2d 368 (1975), where the prosecutor commented that three persons could testify and two aren't here and that the state's

case was "uncontroverted", the court said (at 372):

> "Any argument the state's evidence is uncontroverted may be subject to misinterpretation. A plea of not guilty controverts and puts in issue every material allegation of the indictment" ..."the state argues misconduct of counsel is ground for reversal only if it deprives defendant of a fair trial" ..."but where as here there is a violation of defendant's fundamental rights under the United States Constitution, we can hold error harmless only when we can declare a belief it was harmless beyond a reasonable doubt."

The significant errors that the court attaches to such comments of the prosecutor are: 1. That a not guilty plea controverts all of the state's case. Therefore, any comment by the prosecutor beyond that is obviously intended to call attention to the fact that the defendant did not testify. And, 2. That since such comment is an infringement upon the constitutional rights of the defendant it must be regarded in the light of being intrinsically and fundamentally harmful unless the state can show beyond a reasonable doubt that it was not.

In Oregon the necessity for a precautionary instruction by the court regarding a defendant's right not to take the stand and have no inference drawn therefrom is mandatory. The trial court gave such instruction over the objection of defendant's counsel. This court affirmed the conviction. Lakeside v. Oregon, 435 U.S. 333 (1978). Mr. Justice

Stevens dissented (at 344-345), and in reviewing the Griffin case, said:

> "Of course, a defendant's silence at his own trial is 'almost certain to prejudice the defense no matter what else happens in the courtroom', for the jury will probably draw an unfavorable inference despite instructions to the contrary. Although this 'cost' can never be eliminated, Griffin stands for the proposition that the government may not add unnecessarily to the risk taken by a defendant who stands mute. Reasonable men may differ about the wisdom of that holding. But if it is still the law, this conviction should be overturned."

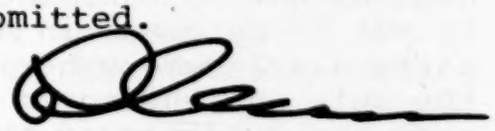
In most of the cases cited the appellate courts seem to be particularly concerned about those instances in which the prosecutor has emphasized the failure of the defendant either to take the stand or otherwise to put in evidence in his defense and more particularly where he is in all likelihood the only one who could effectively controvert the evidence of the prosecution. In the present case the court said that it did not think that the comment of the prosecutor "was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" and felt further that any prejudice which might otherwise have resulted from the comment was prevented by the court's instruction. However, it is obvious that the prosecutor in the present case meant to emphasize the defendant's failure to testify by attaching to it the

word "important", not once but twice in the same sentence when he said "the important thing, I submit, that is very important in this case, you will recall that during the trial of this case, Mr. Martin has chosen not to present a defense." He also focused on the word "chosen", which in essence says that the defendant has chosen to exercise one of his constitutional rights and should therefor be punished for it. It is well known by lawyers that an instruction by the court to disregard a comment cannot cure or remove the lasting and damaging impact of the comment. It is specially true when a fundamental constitutional right has been violated.

CONCLUSION

For all the reasons stated the judgment of the District Court and the Circuit Court of Appeals should be reversed. The petition for writ of certiorari should be granted.

Respectfully submitted.



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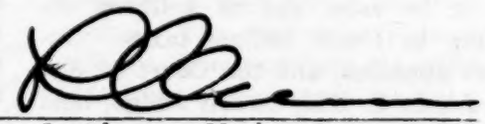
CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the within and foregoing Brief of Appellant upon Mr. Gilbert E. Andrews, Chief Appellate Section, Office of Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D.C. 20530, and three copies of the within and foregoing Brief of Appellant upon the Solicitor General, Department of Justice, Washington, D.C. 20530, all the parties required to be served, by depositing a copy of same in the United States mail in a properly addressed envelope with air mail postage affixed thereon to insure delivery.

Dated this 13th day of May, 1980.



L. Anthony Weisensee

UNITED STATES of America, Plaintiff-Appellee,

v.

Philip G. DOWNS, Defendant-Appellant.

No. 79-5439
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

April 17, 1980.

Defendant was convicted in the United States District Court for the Northern District of Georgia, Albert J. Henderson, J., of willfully making and subscribing to income tax returns he knew to be false and of willfully attempting to evade income taxes. Defendant appealed, and the Court of Appeals, James C. Hill, Circuit Judge, held that: (1) any error that might have occurred when the prosecutor made comments in closing argument which assertedly were an attempt to paint defendant as a "bad man" was invited by defendant's attorney in his opening statement and, therefore, could not provide a basis for reversal, and (2) a remark by the prosecutor in closing argument that defendant's attorney "chose not to present a defense" was not an impermissible reference to defendant's failure to testify.

Affirmed.

1. Criminal Law ⇐730(1), 1171.7

Even assuming that assertedly objectionable remarks of prosecutor in closing argument were an attempt to paint defendant as a "bad man," the remarks did not require a new trial where, at the very least, all but the last 11 words of the prosecutor's statement was attributable to the opening remarks of defense counsel so that any error was invited by defendant's attorney and thus provided no basis for reversal and where the bulk of the statement was merely a rehashing of what defense counsel had said and the trial court's instruction adequately protected defendant from any potential prejudice arising from the last part of the comment.

2. Criminal Law ⇐721(3)

Comment by prosecutor in closing argument to the effect that defendant's attorney "chose not to present a defense" was not of such a character that a jury would naturally and necessarily take it to be a comment on defendant's failure to testify and did not require a mistrial. U.S.C.A.Const. Amend. 5.

3. Criminal Law ⇐721(5)

It does not violate the defendant's right not to testify to state in argument to the jury that the government's case was unrebutted. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐730(10)

Any prejudice which might otherwise have resulted from prosecutor's statement to the jury that defendant's attorney "chose not to present a defense" was prevented by the district court's instruction that the defendant in a criminal case is not required to present a defense and that the jurors should disregard the prosecutor's comment. U.S.C.A.Const. Amend. 5.

* Fed.R.App.Proc. 34(a), 5th Cir. Local R. 18.

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Appeal from the United States District Court for the Northern District of Georgia.

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Appellant was the vice-president in charge of trucking for E.T. Barwick Industries, Inc., a carpet manufacturer. During 1972 and 1973, Barwick trucks were engaged in a practice known in the industry as "illegal backhauling." Appellant was not prosecuted for his involvement in the illegal scheme; rather, he was indicted for failing to include in his tax returns for 1972 and 1973 income allegedly received by him from those who had been provided with the illegal service.[1]

In his opening statement, defense counsel admitted appellant's involvement in the illegal activities. He also conceded that appellant had received the illegal payments, but told the jury that the defense would establish that the money was received for and ultimately spent on behalf of Barwick, and therefore did not constitute income to appellant. The relevant portion of the opening statement reads as follows:

> This is the critical fact in this case, and it's the most difficult thing for a jury. This is what you are going to have to decide about the case. That money was used, I think we can prove it to your satisfaction, the money was used, went to Mr. Downs' checking account, was used to pay people off throughout the system to make it work, pay off that scale that you see on the interstate highways when you go between Atlanta and Tennessee, pay off those truck scale men that run the system to make sure that E.T. Barwick Company, without the ICC, knowing it is coming back to Atlanta, knowing it is full of goods, knowing it is breaking the law, that money was used to make the system work.
>
> I think we will be able to prove it, that money was spent by Mr. Down on behalf of E.T. Barwick Industries. That is not good. That is not right. But that's not what he is charged with. He is charged with income tax evasion.

Record, vol. III, at 23.

At the close of the government's case, appellant moved for a judgment of acquittal. The motion was denied. The defense then exercised its right not to offer any evidence and rested. During the closing argument, the prosecutor, apparently prompted by the straw man erected in defense counsel's opening statement, made two comments which, appellant contends, require us to reverse his convictions. We affirm.

[1] The first allegedly improper remark directly related to defense counsel's opening statement:

> Ladies and gentlemen, you probably noticed right from the beginning of this case the flavor of the case as it was presented, right at the very start. You will recall the opening statement by Mr. Martin, counsel for the defendant, when he said, oh, yes, the defend-

1. Appellant was charged with two counts of willfully making and subscribing to income tax returns he knew to be false, 26 U.S.C.A. § 7206(1), and one count of willfully attempting to evade income taxes, 26 U.S.C.A. § 7201.

> ant was doing wrong here, that it will be shown; but he said at the same time that doesn't mean he was doing wrong here, of course, denying any kind of tax liability or tax implications, but at the same time admitting he was a wrongdoer.

Record, vol. IV, at 3.

Counsel objected to the comment, claiming that the prosecutor was attempting to argue to the jury that appellant was a habitual criminal. Appellant's motion for a mistrial was denied, but the jury was instructed to disregard that part of the prosecutor's statement "in which he alluded to the defendant as being a wrongdoer." Record vol. IV, at 5.

Even assuming that the prosecutor tried to paint appellant as a "bad man," a new trial is not required. At the very least, all but the last eleven words of the prosecutor's comment is attributable to the opening remarks of defense counsel. The bulk of the statement merely was a rehashing of what appellant's attorney had first said. The error, if any, was invited by appellant's attorney, and, therefore, cannot now be claimed as grounds for reversal. *See United States v. Martinez*, 604 F.2d 361, 366 (5th Cir. 1979). With respect to the last part of the comment—"but at the same time admitting that he was a wrongdoer"—the trial court's instruction adequately protected appellant from any potential prejudice.

[2] Later in his closing argument, the prosecutor reminded the jury that appellant's attorney, Mr. Martin, "chose not to present a defense." Record, vol. IV, at 11. Appellant again unsuccessfully moved for a mistrial. The jury was instructed that the defendant in a criminal case is not required to present a defense, and that they should disregard the prosecutor's comment. Record, vol. IV, at 15. It is urged that the comment was an impermissible reference to appellant's failure to testify, and that it had the effect of shifting the burden of proof, at least in the minds of the jurors, to appellant.

[3, 4] We do not think that the comment "was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 295, 54 L.Ed.2d 188 (1977); *accord, United States v. Harbin*, 601 F.2d 773, 777 (5th Cir. 1979); *United States v. Chandler*, 586 F.2d 593, 603 (5th Cir. 1978), *cert. denied*, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979); *United States v. Ward*, 552 F.2d 1080, 1083 (5th Cir.), *cert. denied*, 434 U.S. 850, 98 S.Ct. 161, 54 L.Ed.2d 119 (1977). It appears more likely that the prosecutor was attempting to point out to the jury that the government's case was unrebutted. That type of argument does not violate the defendant's right not to testify. *United States v. Dearden*, 546 F.2d at 625. And we find no merit to the contention that the statement had the effect of shifting the burden of proof in the minds of the jurors. Any prejudice which might otherwise have resulted from the comment was prevented by the court's instruction. *Id.*

AFFIRMED.

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